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5 Ways To Hone Deposition Skills And Improve Results

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With depositions, too often we see lack of excellence by the attorney conducting the questioning due to minimal or no training, practice or both.

Attorneys should be mindful of certain best practices when conducting depositions and should not take depositions for granted. While depositions are rarely the event that wins the case for your client, if conducted effectively, depositions are a vital part of the preparations needed to succeed in winning a dispositive motion or a trial.

Check out the following five tips for honing your deposition skills.

1. Prepare, prepare, prepare.

While you should be prepared for anything you do in representing your client, it is especially important to be prepared for a deposition, especially with more and more jurisdictions imposing deposition time limits.

Unlike your witnesses, where you will have more opportunities to discuss the issues of the case, when working with an opposing party's witness, the deposition is almost always the only opportunity you will have to obtain information from that person before you file your dispositive motion or before trial.

To adequately prepare to depose a witness, you should not only be thoroughly apprised of the discovery materials produced and the applicable law for the issues involved, but also conduct some due diligence research on the witness.

You should find out what you can about the particular witness's connection to the case, their background and any relevant prior experiences.

In today's world, where there is so much public information available, there is no excuse not to do such research with as much care and enthusiasm as you would in researching the applicable law and reviewing the applicable discovery materials connected to your case.

You should conduct every deposition feeling confident that you know everything about that witness's connection and involvement in the dispute, as well as their training, background and prior experience related to the topics to be explored. This is especially true for expert witnesses, but also important for fact witnesses.

Witnesses also take note when you ask a question that shows you did your homework. Often, they will be less likely to exaggerate or mislead in their answers since they will assume you have the backup information to reveal any misrepresentation or bias in their responses.

Thorough research will keep deposition questioning focused and most effective.

2. Be a critical listener.

You have probably been advised to create a deposition outline instead of writing out specific

questions. The reason for such advice is to keep you from getting distracted or being so eager to get to your next question that you fail to listen to, and understand, the answers.

Inexperienced attorneys often fail to hear important portions of answers because they are too focused on the questions they plan to ask. Failing to hear the entire answer often causes you to miss the opportunity to explore lines of questioning you did not contemplate during your preparations.

The witness may state a fact not included in any of the written discovery, and you need to be ready to ask probing follow-up questions to explore and ultimately exhaust that witness's knowledge on that topic. Having an outline instead of entirely written questions should help you be more attentive to what the witness says during their answers.

Similarly, taking minimal notes will reduce distractions and help you be a critical listener. Most attorneys will have the transcript typed up after the fact, or nowadays, you can have a real-time feed during the deposition.

So put your pen down, look at the witness and listen to each of their answers to ensure that you do not miss a potentially important opportunity.

For instance, during the questioning of what the witness did to prepare for the deposition, failing to be a critical listener may result in you not hearing that someone was present during a preparation session, which would destroy the attorney-client privilege.

Critical listening is also important to ensure you have a clear record of the testimony you want to preserve for later use. If the witness is being evasive or nonresponsive to your questioning, it is your unequivocal duty to get them to answer the exact question you asked. You will only be able to do that if you are listening closely to their testimony.

3. Develop your theme.

Before your deposition, know what theme or themes you believe will be useful and ask questions to help develop that theme. Whether you are representing the plaintiff or the defendant, you should have a theme to present to the trier of fact.

Themes help focus your judge or jury on the important aspect of the case and allow you, during opening statements and during witness questioning, to frame the critical issues and facts to keep them alive and relevant in the judge or jury's minds and prepare them for your closing argument.

Even if you feel your case will be appropriate for a dispositive motion, using and developing a theme will help persuade the judge that the facts and the law support ruling in your client's favor.

Sometimes, you learn things in depositions that will convince you that the theme you initially planned may not work. When this happens, it is a learning experience that will help you during the later stages of the litigation. It is much better to figure this out during a deposition instead of during a trial.

So, feel free to ask questions that might give you negative information so that you learn the negative facts of your case early, giving you time to prepare how to counter them with other witnesses or documents before you present your dispositive motion or go to trial.

In addition, while you are asking questions to develop your theme, you should also establish those topics and issues for which the witness does not have personal knowledge, thereby locking them out from testifying on topics that lessen or undermine the effectiveness of your theme. Blocking out a witness on certain topics may be just as important as getting admissions.

4. Effectively deal with objections.

While sometimes objections during a deposition are necessary, these objections are too often used for improper purposes. The rules relating to objections at depositions generally require the objection to be concise and to be stated in a nonargumentative and nonsuggestive manner.

In other words, the objector should state the objection and the basis for the objection, but should not make speeches which are usually meant to distract the questioner or coach the deponent.

Further, aside from testimony that meets the elements for attorney-client privilege, an objecting attorney should not be instructing their witness not to answer your question. Be ready to shut down inappropriate objections at the very first instance and be ready to require the witness to answer your question.

Inexperienced attorneys sometimes get intimidated by overly aggressive opposing counsel, set on attempting to influence or otherwise distract witnesses with bullying behavior and long-winded, verbal objections. Don't be timid. Call out inappropriate objections by making a statement on the record, noting the inappropriate coaching.

In extreme situations, you should threaten to use all the methods available to you to protect the record.

Some jurisdictions provide for calls to the judge to resolve disputes during the deposition or to order certain depositions — where opposing counsel has been acting improperly during more than one deposition — to occur in the courthouse, where a judge can be available to help curb inappropriate attorney behavior.

Usually, being assertive early in the deposition, quoting the rules and threatening to go to the judge will stop bad opposing counsel behavior. Thus, be ready if improper conduct occurs, stay focused, and do not let it distract you from the task at hand.

Note that during a deposition, you can, and sometimes should, ask questions that call for hearsay or witness opinions, as the scope of discovery is broad. You are allowed to ask things that might not be admissible at trial, as long as you meet the applicable standard for discoverable information.

5. Consider videotaping the deponent.

We all know a picture is worth a thousand words. But a video can be worth much more, especially during a deposition.

While the expense of taking a video of witnesses for a case may be considerable, you should consider whether the potential value of videotaping your deponents justify these costs.

In many jurisdictions, depositions can be presented substantively at trial, based on witness availability. In those situations, letting the judge or jury observe the witness via video is more effective than simply submitting or reading the typed transcript into the record.

Even when those depositions are not allowed to be admitted substantively, using a video recording for impeachment purposes can be a powerful tool to get your point across at trial. It is more effective to show a judge or a jury a prior inconsistent statement during impeachment than just to read it.

Further, witnesses may look or act as if they are not truthful through body language, such as fidgeting, taking too much time to respond, sipping too much water before every answer, being evasive, or being snide in their responses.

The way the witness acted during a deposition may help your case, so always consider if you should hire a videographer to accompany your court reporter. The extra expense may be worth it if your case proceeds to trial.

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